LIBRARY
SUPREME COURT, U. S.

No. 199

Office-Supreme Court, U.S.
FILED
AUG 21 1958
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

AMERICAN UNION TRANSPORT, INC., PETITIONER,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
Attorney,
Department of Justice,
Washington 25, D. C.

E. ROBERT SEAVER,
General Counsel,
ROBERT E. MITCHELL,
Assistant General Counsel,
EDWARD APTAKER,
ROBERT C. BAMFORD,
Attorneys,
Federal Maritime Board,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Argument	7
Conclusion	12
Appendix	13

CITATIONS

Cases:

Agreements and Practices Re Brokerage, 3 U.S.M.C. 170	9, 11
American Union Transport, Inc. v. *Italian Line*, 2 U.S.M.C. 553	2, 9
American Union Transport v. *River Plate and Brazil Conferences*, 126 F. Supp. 91, affirmed, 222 F. 2d 369	4
City of Dallas v. *Civil Aeronautics Board*, 221 F. 2d 501, certiorari denied, 348 U.S. 914	11
Civil Aeronautics Board v. *State Airlines*, 338 U.S. 572	11
Federal Maritime Board v. *Isbrandtsen Company*, 356 U.S. 481	10
Gulf Brokerage and Forwarding Agreements, 1 U.S.S.B.B. 533	2
Keogh v. *C. & N. W. Ry. Co.*, 260 U.S. 156	8
Pacific Westbound Conference Agreement, 2 U.S.M.C. 775	9
United States v. *American Union Transport*, 327 U.S. 437	2

Statutes:

Administrative Procedure Act, Section 3, 5 U.S.C. 1002	11
Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801, *et seq.*:	
Section 14, Third	10
Section 15 (46 U.S.C. 814)	5, 11, 13

Statutes—Continued

Page

Section 16 (46 U.S.C. 815) 5, 7, 8, 11, 14
Section 22 (46 U.S.C. 821) 4, 9, 15

Miscellaneous:

H. Rep. 2598, 74th Cong., 2d Sess. 8

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 199

AMERICAN UNION TRANSPORT, INC., PETITIONER,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME BOARD IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A-1–A-12) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1958 (Pet. App. A-13), and the petition for a writ of certiorari was filed on July 22, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Maritime Board refused to award reparations to a freight forwarder covering "brokerage".

claims against ocean carriers. The questions presented are:

1. Whether the Board correctly held that, since the services for which "brokerage" was sought were not rendered for the carriers but for the consignee, payment of brokerage therefor by the carriers would constitute an indirect rebate to the consignee which was prohibited by Section 16 of the Shipping Act, 1916.

2. Whether the Board correctly concluded, as an additional basis for denying reparations, that the freight forwarder had not earned brokerage because the services which it performed were not those of a broker (*i.e.*, obtaining cargo for the ship) but those of a freight forwarder.

STATUTE INVOLVED

The pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801, *et seq.*, are set forth in the Appendix, *infra*, pages 13-16.

STATEMENT

Petitioner is a freight forwarder, a broker, an owner, and charterer of vessels, and a water carrier (Pet. App. B-3).[1] Early in 1952, the Estrado de Ferro Central do Brazil ("Central"), an instrumentality of the Bra-

[1] A broker acts as the carrier's agent in obtaining cargo for the carrier, as compensation for which it receives a percentage of the freight charges, called "brokerage." *American Union Transport, Inc.* v. *Italian Line*, 2 U.S.M.C. 553, 553-554. A freight forwarder, acting as agent for the shipper or consignee, arranges for bringing the cargo to the ship, prepares export documents, and renders other services in connection with the shipment. See *United States* v. *American Union Transport*, 327 U.S. 437, 442-443. The same person frequently may act as broker for one principal and as freight forwarder for another with respect to the same transaction. *Gulf Brokerage and Forwarding Agreements*, 1 U.S.S.B.B. 533.

zilian government, purchased 120 locomotives and spare parts therefor from manufacturers in the United States (*id.*, B-4). Both petitioner and the River Plate and Brazil Conferences (the "conference") attempted to secure the business of transporting the locomotives (*ibid.*). Central selected the conference, and designated Lloyd-Brasiliero, one of the conference lines and also an instrumentality of the Brazilian government, to carry the locomotives (*id.*, B-4–B-9). At the same time, Central designated petitioner as "brokers in charge of negotiations and arrangements in connection with these shipments by Lloyd Brasiliero or another member of the Conference, *without any charge to Central*" (J.A. 155, emphasis added).[2] Petitioner admittedly expected to secure its compensation for these services by obtaining brokerage payments from the steamship lines (J.A. 98).

Pursuant to its agreement with Central, petitioner performed sundry services in connection with the shipments. It arranged overland transportation to shipside, coordinated manufacturer's delivery dates with steamer sailings, procured consular invoices, customs declarations and export permits, reserved space, booked cargo, prepared bills of lading, and advised Central when to expect incoming shipments (Pet. App. B-7, B-13).

Seventy-six of the locomotives were shipped from New York, all on vessels of Lloyd Brasiliero (Pet. App. B-7; J.A. 60-61). When the first locomotives were ready for shipment, petitioner on June 11, 1952 advised Lloyd Brasiliero that payment of brokerage by the latter to petitioner at 1¼ percent of the ocean freight

[2] "J.A." refers to the joint appendix in the Court of Appeals.

would be expected (Ex. 16, J.A. 162-163). Lloyd Brasiliero replied the following day that it would not pay brokerage on shipments to another Brazilian government agency (Ex. 17, J.A. 164). Petitioner nevertheless continued to perform the freight forwarding services for Central on all shipments via Lloyd Brasiliero (Pet. App. B-7). The other 44 locomotives were shipped from Montreal, Canada, on vessels of other conference lines (Pet. App. B-7; J.A. 60-61).

On June 12, 1952, the conference held a special joint executive meeting to determine whether brokerage should be paid to petitioner on the locomotives "[i]n view of the fact that * * * [petitioner] negotiated for these locomotives as a competitor carrier * * *" (Pet. App. B-6). At the meeting, the conference voted "that no brokerage be paid on the 120 locomotives" (*ibid.*). Petitioner learned of this action shortly thereafter (Pet. App. A-5-6; J.A. 110-111). Petitioner's bills for brokerage to one of the conference lines (Moore-McCormack Lines) were returned unpaid on October 14, 1952 "with the explanation that the line could not pay it due to the Conference action of June 12, 1952" (Pet. App. B-6).

After unsuccessful attempts to collect brokerage from the carriers,[3] petitioner filed a complaint with the Federal Maritime Board under Section 22 of the Shipping Act, 1916, seeking reparations of $11,647.11 for

[3] After the carriers had refused to pay brokerage, petitioner filed a private antitrust action against the conference and its member lines, alleging that the conference action of June 12, 1952 violated the Sherman Act. The District Court dismissed the suit on the ground that the claim was within the Board's exclusive jurisdiction. *American Union Transport, Inc. v. River Plate and Brazil Conferences*, 126 F. Supp. 91 (S.D.N.Y.), affirmed, 222 F. 2d 369 (C.A. 2). The proceeding before the Board followed.

the amount of brokerage allegedly denied petitioner as a result of the conference action (Pet. App. A-6-A-7). Petitioner contended that the conference agreement of June 12, 1952 not to pay it brokerage was illegal under Section 15 of the Shipping Act, 1916, because it had not been approved by the Board (*ibid.*).

After full administrative proceedings, the Board denied reparations. The Board ruled that the conference agreement of June 12, 1952 "amounted to a new course of conduct for its members in relation to the payment of brokerage, *i.e.*, it prohibited the payment of brokerage regarding specified shipments"; and that it therefore constituted "a modification of an existing agreement which, because it was calculated to control, regulate, prevent, or destroy competition, and provided for an exclusive, preferential, or cooperative working arrangement, was required to be filed under section 15 of the Act with the Board for approval prior to its effectuation" (Pet. App. B-9–B-10). The Board further held, however, that petitioner was not entitled to reparations. It ruled that the services for which petitioner was claiming brokerage were in fact "freight forwarding services for the consignee [which petitioner performed] without compensation therefor [by the consignee]"; and that the collection of such freight forwarding fee "from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage payment included the cost of the freight forwarding services and therefore [was] an 'unjust or unfair device or means'" which was prohibited by Section 16 of the Shipping Act, 1916 (*id.*, B-11–B-12). The Board stated (*id.*, B-12) that "[e]ven if brokerage was otherwise recoverable we

would not order it paid where such payment would countenance a violation of section 16 of the Act and thus be illegal."

The Board also held (*ibid.*) that "brokerage could not be recovered here, section 16 notwithstanding, simply because brokerage was not earned." It stated (*ibid.*) that brokerage is "securing cargo for the ship"; and that "[c]learly, on this record, AUT did not secure the cargo for the ship. On the contrary, it is apparent that the transportation was sold directly by the Conference to Central, and that Central reserved to itself the right to select the individual carrier in every instance." It pointed out (*id.*, B-13) that, except for preparing bills of lading, all of the other services performed by petitioner were "ordinary freight forwarder services," and not services which otherwise "would be performed by the carriers."

The Court of Appeals unanimously affirmed the Board's order. The court stated (Pet. App. A-9) that it was "perfectly obvious" that petitioner "performed no services as a broker in the ordinary sense of the term 'broker,' *i.e.*, securing cargo * * * for the Conference," but on the contrary petitioner was "in direct conflict" with the conference in seeking the cargo. The court ruled (*ibid.*) that "except in a few minor details the services rendered inured not to the benefit of the carrier but to the benefit of the consignee, and, to that extent the Board was correct in holding that the consignee benefited and that a rebate in effect resulted." It noted (*id.*, A-11) that Central's appointment of petitioner as its broker "could not create any liability on the part of the ocean carriers"; and that there was no agreement by the conference to incur liability to petitioner, "with whom it had engaged in competition for

the very business for which it [petitioner] now claims compensation by way of reparations," for "ordinary freight forwarder service" (*id.*, A-10). The court stated (*id.*, A-12) that, "even in the case of violation of § 15, injury must be shown before a recovery can be had; AUT having had no right to brokerage, it suffered no damage by the action complained of." The court also held (*id.*, A-12) that there was "no merit" to petitioner's claim that the Board's proceedings were "procedurally invalid."

ARGUMENT

1. Section 16 of the Shipping Act, 1916, makes it unlawful for any "consignee, forwarder, broker, * * *, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, *or by any other unjust or unfair device or means* to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable" (emphasis added). We submit that the court below correctly upheld the Board's ruling that permitting petitioner to collect "brokerage" from conference members for the services which it rendered in this case would constitute an indirect rebate in violation of Section 16.

As the Board correctly found (Pet. App. B-15), all of the services which petitioner provided (with one minor exception) were "ordinary freight forwarder services" whose performance was the duty of the shipper, not of the carrier. Petitioner, however, undertook to perform these services for the consignee without charge, and to look to the carriers for compensation. Had petitioner not provided such services,

Central (and not the carriers) would have been obligated to perform them at its own expense. Thus, the effect of petitioner's "waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage payment included the cost of the freight forwarding services and therefore an 'unjust or unfair device or means' " (*id.*, B-12). Since payment of such "brokerage" by the conference to petitioner would have been illegal, the Board properly refused to award reparations therefor. *Keogh* v. *C. & N. W. Ry. Co.*, 260 U.S. 156.

Petitioner contends (Pet. 12) that Section 16 is "simply intended to prevent shippers, consignees, and their representatives from cheating carriers through specified types of fraudulent conduct," and that payment of "brokerage" by the conference would not violate that section because petitioner "perpetrated no fraud whatever" (*id.*, 13). But the prohibition in Section 16 against "any other unjust or unfair device or means to obtain * * * transportation by water for property at less than the rates or charges which would otherwise be applicable" is not limited to fraudulent devices or means. The legislative history of this provision shows that it was designed "to prohibit false billing *and other practices* sometimes employed in attempts to obtain transportation by water at less than regular rates or to secure allowances or refunds in connection with such transportation." H. Rep. No. 2398, 74th Cong., 2d Sess., p. 2 (emphasis added). A device which results in carriers' paying for services which a consignee otherwise would be required to provide obvi-

ously results in the consignee's obtain[ing] transportation by water * * * at less than the rates or charges which would otherwise be applicable."[4]

2. The court below also correctly held that the Board properly denied reparations because petitioner had not earned brokerage. Section 22 of the Shipping Act, 1916, authorizes the Board to award reparations where the Act has been violated only "for the injury caused by such violation." As the Board consistently has held, the service for which the carrier pays brokerage is the securing of cargo for the ship. *Pacific Westbound Conference Agreement*, 2 U.S.M.C. 775, 780 (1946); *American Union Transport, Inc.* v. *Italian Line*, 2 U.S.M.C. 553, 557 (1941); *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170, 172 (1949). As both the Board (Pet. App. B-12) and the court below (*id.*, A-9) correctly held, petitioner did not secure the cargo for the conference. On the contrary, the conference itself obtained the cargo directly from the consignee, and petitioner was competing against the conference in trying to obtain the business for itself. The court below pointed out (*id.*, A-11) that petitioner's appointment "as a broker by Central could not create any liability on the part of the ocean carriers. * * * [Petitioner] was not the broker for the carriers to obtain the contract and there was no agreement at any time between AUT and the members of the Conference to pay brokerage." Since substantially all of

[4] Petitioner's reliance (Pet. 13) on a statement in the House Committee Report that this provision was not intended "to prohibit the payment by carriers of legitimate brokerage" is beside the point. Payment by carriers for freight forwarder services which are rendered for the benefit of the consignee cannot be deemed to constitute "legitimate brokerage." See *infra*, pp. 9-12.

the services for which petitioner sought brokerage were performed for the benefit of the consignee, and not of the carriers, petitioner did not earn any brokerage for which it had a valid claim against the carriers.

Petitioner contends (Pet. 16), however, that it "would have received brokerage if the Conference had not restrained its members from paying it," and that the Board and court were "rationally obligated to make the ultimate finding that the [alleged] conspiracy [by the conference not to pay brokerage] injured the petitioner to an extent measured by the lost brokerage" (*id.*, 15).[5] But if the conference members had paid petitioner "brokerage" for the freight forwarder services which it rendered, such payments also would have constituted an indirect illegal rebate in violation of Section 16 (see *supra*, pp. 7-9). Petitioner cannot complain because, as a result of an illegal agreement by the conference, it was denied brokerage which it had not earned and to which, therefore, it had no valid claim. As the court below stated (Pet. App. A-12), "even in the case of a violation of § 15, injury must be shown before a recovery can be had; AUT having had no right to brokerage, it suffered no damage by the action complained of."

Contrary to petitioner's contention (Pet. 8-10), the decision below is not in conflict in any way with *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U.S. 481. The question in the *Isbrandtsen* case was the legality of a dual-rate system under Section 14 Third

[5] At best, this argument is applicable only to the 44 locomotives that moved from Canada on carriers other than Lloyd Brasiliero. The record is clear that the latter refused to pay brokerage for the 76 locomotives which it shipped, not because of the action of the conference, but because it would not pay brokerage on shipments to another agency of the Brazilian government. See *supra*, p. 4.

of the Shipping Act, 1916. The Court held that the system was illegal and that the Board, therefore, could not approve it under Section 15. In the instant case, however, the Board held that the conference agreement not to pay brokerage was illegal because it had not been approved by the Board. The question here is whether that holding automatically entitled petitioner to recover "brokerage" from the conference, even though such brokerage had not been earned and its payment would have involved an illegal indirect rebate.[6] The

[6] Petitioner also challenges the Board's order on two procedural grounds, neither of which has merit.

1. Petitioner contends (Pet. 17-19) that it was not given notice that the legality of brokerage payments under Section 16 was in issue in the case. But when petitioner invoked the Board's jurisdiction by filing the complaint, it necessarily was on notice that any defenses involving the validity of its claim would be at issue. Furthermore, petitioner had actual notice during the course of the proceedings that the conference was challenging the legality of brokerage payments to it. The point was argued by the conference in its brief to the examiner (J.A. 213-216), discussed in the examiner's decision (J.A. 68), argued by the conference in its exceptions thereto (J.A. 217, 220), argued by petitioner itself in its reply to those exceptions (J.A. 221), and discussed by the conference during oral argument before the Board (J.A. 222). Such actual notice was sufficient. *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572; *City of Dallas* v. *Civil Aeronautics Board*, 221 F. 2d 501 (C.A.D.C.), certiorari denied, 348 U.S. 914.

2. Petitioner urges (Pet. 19-21) that, since the Board previously had held that "payment of brokerage by the carrier is not a payment to a shipper" (see Pet. 19), the Board's action in this case constituted a retroactive application of a new rule which had not been promulgated in accordance with the rule-making standards of the Administrative Procedure Act. But the Board decisions upon which petitioner relies involved payment of brokerage "in return for services to the carrier" (see *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170, 175) and not, as in the instant case, payments for services rendered to the consignee. The Board has never approved payments of brokerage by carriers to freight forwarders for freight forwarding services rendered for the consignee. In any event, an agency is not precluded from enunciating a new principle in adjudicatory rather than in rule-making proceedings.

court below answered that question in the negative. The correctness of that ruling involves only the application of settled principles under the Shipping Act, 1916, to the particular facts of this case, and presents no question of general importance calling for further review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Attorney.

E. ROBERT SEAVER,
General Counsel,
ROBERT E. MITCHELL,
Assistant General Counsel,
EDWARD APTAKER,
ROBERT C. BAMFORD,
Attorneys,
Federal Maritime Board.

AUGUST 1958.

APPENDIX

Pertinent provision of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801, *et seq.*, are as follows:

Section 15. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in viola-

tion of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. [46 U.S.C. 814]

Section 16. It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense. [46 U.S.C. 815]

Section 22. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter,

investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation. * * * [46 U.S.C. 821]